UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re: 655 CORPORATION, Debtor.	Chapter 11 Case No. 06-13020-JNF

LIMITED OPPOSITION OF CATHAY BANK TO MOTION OF CHAPTER 11 TRUSTEE TO APPROVE STIPULATION BETWEEN TRUSTEE AND LBM FINANCIAL LLC

Cathay Bank ("Cathay"), a secured claimant as successor to General Bank, hereby files its limited opposition to the Motion to Approve Stipulation Between Mark DeGiacomo Chapter 11 Trustee ("Trustee") and LBM Financial LLC ("LBM") filed on or about April 7, 2009 ("Motion"). Through the Motion, the Trustee seeks approval of the terms of the Stipulation By and Among Mark G. DeGiacomo Chapter 11 Trustee of the Estate of 655 Corporation and LBM Financial LLC ("Stipulation") and the authority to implement the Stipulation upon its approval by the Court. The purpose of this limited objection is to ensure that any order that enters approving the Stipulation does not prejudice any rights Cathay may have to, among other things, seek payment from LBM on account of "unit fees" previously paid by Cathay to LBM pursuant to a Disbursement Agreement, discussed below, or otherwise unfairly prejudice any claims Cathay may otherwise have or seek to assert against LBM. In further support of its limited opposition, Cathay states the following:

Background

1. The Debtor, 655 Corporation ("Debtor") filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code on or about September 1, 2006 (the "Petition Date").

Initially, the Debtor managed its property as a debtor-in-possession under §§ 1107 and 1108 of the Bankruptcy Code.

2. As of the filing, the Debtor was the owner of a partially developed condominium complex located at 653-659 East Second Street, South Boston, Massachusetts (the "Project") comprised of 18 planned condominium units (the "Units") and 44 parking spaces (the "Spaces").

3. Cathay's predecessor in interest, General Bank, funded a construction loan to the Debtor in the original principal amount of $5,600,000 (the "Senior Loan"). The closing relating to the Senior Loan occurred on or about May 14, 2003 (the "Closing Date"). The Senior Loan is secured by a mortgage on title to the Project, as well as a collateral assignment of leases and rents.[1] As of the Petition Date, Cathay's claim was in the approximate amount of $6,033,731.68.[2] There is no dispute that Cathay currently holds a first priority mortgage against the Project.[3]

4. The obligations of the Debtor to Cathay are guaranteed by Bernard Laverty and Barry Queen, the principals of the Debtor, pursuant to separately executed unlimited personal guaranties. Barry Queen filed a Chapter 7 petition on July 6, 2006, which case is currently pending.

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[1] The mortgage documents were recorded with the Suffolk County Registry of Deeds (the "Registry") on May 14, 2003 as Document Nos. 656505 and 656506, and are noted on Certificate of Title No. 114024 of the Property. Furthermore, a UCC-1 financing statement dated May 14, 2003 was also filed with the Registry as Document No. 656507.

[2] Consists of principal and interest through September 1, 2006, but expenses through only June 30, 2006.

[3] The mortgage securing the Loan was believed, as of the Closing Date, to be a first mortgage. However, a Massachusetts Land Court action in which New England Phoenix Co., Inc. ("NEPCO ") asserted that its mortgage on the Property was fraudulently discharged, and in which a lis pendens had issued, raised the possibility that there was an encumbrance that had priority over Cathay's mortgage. With respect to that potential encumbrance, on or about December 14, 2006, the Debtor commenced an adversary proceeding against NEPCO, Cathay, LBM and Barbara Buckley pursuant to which the Debtor objected to NEPCO's secured claim and sought to avoid the NEPCO mortgages under various theories. The parties ultimately settled, resolving that NEPCO would be adjudicated as the holder of a first mortgage against the Property in the principal amount of $425,000. On or about September 2, 2007, the Court approved the settlement and the Trustee subsequently sought and received authority to pay the settlement amount on or about October 23, 2007, and has since disbursed funds paying the amount due NEPCO in full.

5. During May, 2003 through February, 2006, the Debtor also obtained loans from LBM pursuant to various promissory notes and related documents. The Debtor's obligations to LBM ("LBM Pre-petition Obligations") are secured by various mortgages recorded against the Project.[4]

6. Pursuant to a Subordination Agreement dated October 18, 2005, between Cathay and LBM (the "Subordination Agreement"), LBM agreed to subordinate the LBM Pre-petition Obligations to Cathay's Senior Loan. In exchange, Cathay agreed to pay LBM a "unit release fee" ("Fee") equal to up to twenty percent (20%) of the net sale proceeds received by Cathay from sale of each Unit and Space from the Debtor until the obligations owing on the Senior Loan are paid in full. *Subordination Agreement* at ¶ 2.

[4] The LBM encumbrances against the Property that are subject to the Subordination Agreement are as follows.

a. *Mortgage and Security Agreement* from 655 Corporation to LBM in the original principal amount of $1,200,000.00, dated May 9, 2003 (Registry Document No. 656511). Associated with this mortgage is an *Assignment of Leases and Rents* from 655 Corporation to LBM, dated May 9, 2003 (Registry Document No. 656512) and a UCC-1 Financing Statement filed May 14, 2003 (Registry Document No. 656513).

b. *Mortgage and Security Agreement* from 655 Corporation, et al. to LBM (cross-collateralized mortgage) in the original principal amount of $3,250,000.00, dated December 22, 2003 (Registry Document No. 672787). This mortgage does not appear on Certificate of Title No. 114024.

c. *Mortgage and Security Agreement* from 655 Corporation, et al. to LBM (cross-collateralized mortgage) in the original principal amount of $675,000.00, dated December 22, 2003 (Registry Document No. 672788). This mortgage does not appear on Certificate of Title No. 114024.

d. *Mortgage and Security Agreement* from 655 Corporation, et al. to LBM (cross-collateralized mortgage) in the original principal amount of $2,000,000.00, dated March 12, 2004 (Registry Document No. 677624).

e. *Mortgage and Security Agreement* from 655 Corporation, et al., to LBM (cross-collateralized mortgage) in the original principal amount of $418,500.00, dated April 7, 2004 (Registry Document No. 679471).

f. *Mortgage and Security Agreement* from 655 Corporation to LBM in the original principal amount of $850,000.00, dated April 7, 2005 (Registry Document No. 699125). *There is an Assignment of Leases and Rents* from 655 Corporation to LBM, dated April 7, 2005 (Registry Document No. 699126) and a UCC-1 Financing Statement filed April 7, 2005 (Registry Document No. 699127) associated with this Mortgage.

g. *Mortgage and Security Agreement* from 655 Corporation to LBM in the original principal amount of $2,432,000.00, dated January 27, 2006 (Registry Document No. 715322).Associated with this mortgage is an *Assignment of Leases and Rents* from 655 Corporation to LBM, dated January 27, 2006 (Registry Document No. 715323) and a UCC-1 Financing Statement filed February 2, 2006 (Registry Document No. 715324).

7. During the case and with approval of the Court, the Debtor retained a general contractor to complete construction of the Property using proceeds of debtor-in-possession financing obtained from LBM[5], obtained Land Court approval for condominium conversion of the Property, and hired a real estate firm to market the Units and Spaces for sale.

8. Upon substantial completion of the Project, the Debtor also sought, and obtained, authority to sell the Units and Parking Spaces in the ordinary course of business pursuant to Section 363(c) ("Sales") free and clear of all liens, claims and encumbrances ("Liens") pursuant to Section 363(f). The order approving the sales docketed on July 20, 2007 ("Sale Order") provided that the Units and Spaces would be sold free and clear of on the condition that all Liens would attach to the net proceeds of a Sale in the order of priority as existed on the Petition Date. The Debtor was ordered to hold the net Sale proceeds in an interest bearing escrow account pending confirmation of a plan of reorganization or upon further Court Order. Under the Sale Order, LBM and Cathay have the ability to object to proposed sale terms if deemed inadequate.

9. On October 4, 2007, this Court entered an Order directing the Office of the United States Trustee to appoint a Chapter 11 trustee, and the Trustee was appointed on October 5, 2007.

10. After his appointment, the Trustee moved to amend the Sale Order on two occasions in order to obtain the Court's approval to sell the units and spaces under the same conditions as the Debtor and to pay certain expenses in connection with the potential sales. The Court granted the Trustee's requests on or about October 19, 2007 and December 3, 2007 (the "Amended Sale Orders").

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[5] The Debtor sought and obtained approval from this Court for the extension by LBM to the Debtor of two debtor-in-possession loans in the amount of $2,000,000 and $43,735 (the "DIP Loans"). Cathay and LBM agreed that the DIP Loans are subject to the provisions of the Subordination Agreement.

11. On October 30, 2007, the Trustee also moved to disburse sale proceeds held in escrow under the Amended Sale Order to Cathay (the "Disbursement Order"), which request was granted on an emergency basis on or about October 31, 2007.

12. In or about December 2007, Cathay and LBM executed a "Disbursement Agreement," which obligated LBM to pay Cathay an amount equal to eighty percent (80%) of all funds disbursed by the Trustee to LBM on account of the DIP Loan until Cathay is paid in full.

13. In the event that the Trustee fails or refuses to distribute proceeds of Sale to LBM on account of the DIP Loan (or otherwise), LBM is required to seek the Court's intervention to compel payment, and, if LBM is unable to procure such an order, LBM is required to re-pay to Cathay all Fees received by LBM until Cathay is paid in full *Disbursement Agreement* at ¶ 4.

14. As of this date, thirteen Units and thirty-eight parking Spaces have sold.[6]

15. The Trustee has accordingly paid Cathay a total of $5,338,262.93 from net proceeds generated from these sales pursuant to the Disbursement Order. Cathay has correspondingly paid Fees to LBM in the total amount of $732,456.78 for Sales that closed prior to September, 2008. Cathay is holding additional funds in the approximate amount of $238,614.41 representing Fees generated with regard to Sales closed after September, 2008 ("September Fees") and $86,424.99 for the sale of a Unit and two Spaces that closed on February 3, 2009 ("February Fees"), for a total of $325,039.40 (collectively, the "Disputed Fees").

The Settlement With LBM

16. On October 3, 2008, the Trustee brought suit against LBM seeking to recharacterize all obligations owing to LBM as equity, avoid the DIP Loan under Section 549, and to preserve the LBM Mortgages for the benefit of the estate ("Litigation"). The Trustee also sought to recover from LBM all Fees paid by Cathay, and requested entry of an preliminary

[6] Upon information and belief, sales of two Units and one Space are pending.

injunction against Cathay prohibiting Cathay from releasing Fees to LBM pending a resolution of the Litigation.

17. Through negotiations, LBM has agreed to compromise its rights as a secured creditor pursuant to the Stipulation executed by the Trustee and LBM in settlement of the Litigation. In exchange for a release of all claims alleged by the Trustee as to LBM, LBM has agreed to relinquish certain payment rights it arguably holds as a holder of junior secured claims, and to subordinate its secured claims to holders of allowed unsecured claims. The only source for payments to LBM will be from Fees – both paid to date and as might become owing going forward.

18. To accomplish this, under the Stipulation, LBM will waive all rights to the September Fees, and shall only receive 60% of the February Fees. LBM has further agreed to assign sixty percent of all Fees subsequently due to it from Cathay under the Subordination Agreement to the estate – if the Stipulation is approved, upon the closing of any future Sale, the Trustee will pay Cathay an amount equal to 80% of the net proceeds (rather then the 100% it is entitled to from the Debtor as a first priority creditor), pay LBM an amount equal to forty percent of the remaining twenty percent, and shall retain an amount equal to sixty percent of the same twenty percent for the estate.

19. Based on this, LBM's payment right is theoretically capped at no more than forty percent of the amount equal to twenty percent of the net proceeds of all sales that occur with respect to the Project from September, 2008 forward..

20. Perhaps most importantly, under the Stipulation, LBM agrees in paragraph 8 of the Stipulation that "[a]ll Net Proceeds in excess of the Cathay Payoff shall be retained by the bankruptcy estate."

21. Through the Motion, the Trustee seeks Court approval of the Stipulation.

22. While Cathay has limited standing to prevent LBM from reaching a deal with the Trustee, even if to LBM's own detriment, Cathay files this limited objection to the Motion to ensure that its rights under the Disbursement Agreement and the Subordination Agreement are preserved as to LBM.

23. Specifically, the Stipulation is contrary to the Disbursement Agreement between LBM and Cathay in two respects. First, and most importantly, through the Stipulation, LBM waives its right to receive proceeds of sale of units towards satisfaction of the DIP Loan and agrees that those proceeds are to be "retained by the bankruptcy estate." Eighty percent (80%) of those proceeds were supposed to have been delivered by LBM to Cathay until Cathay was paid in full, essentially imposing on LBM an obligation to repay to Cathay the Unit Release Fees from the proceeds of sales LBM receives. The Stipulation itself, therefore, is a breach of LBM's obligations under the Disbursement Agreement, which, contrary to the Stipulation's provisions transferring to the estate the right to those sales proceeds, would require LBM to seek to compel the estate to deliver those proceeds, and to the extent it did not, would require payment by LBM to Cathay of the Unit Release Fees already obtained by LBM.

24. The Stipulation also undermines LBM's ability to comply with its contractual obligation to pay to Cathay the Unit Release Fees it has received, providing that, instead of LBM receiving those Unit Release Fees and having them at LBM's disposal to repay itself, the estate will receive a portion of those Unit Release Fees.

25. The issue that is as yet unknown, however, is whether LBM's transfer of its rights to payment to the estate in breach of its contract with Cathay has any practical impact at all. Cathay's right to receive funds from LBM was derivative of there being sale proceeds above and beyond the amount of the Cathay senior secured claim. If all of the estate's assets are liquidated, and there are no funds in excess of the face amount of Cathay's secured claim, LBM's having

transferred its right to receive the next proceeds, with the attendant obligation to pay eighty percent (80%) of those proceeds to Cathay in reimbursement of the Unit Release Fees paid by Cathay to LBM, will never arise. If sales proceeds above the amount of the Cathay secured claim are realized by the estate, however, LBM will be obligated immediately to pay to Cathay, at minimum, the $732,456.78 in Fees paid by Cathay to LBM to date ("Paid Fees").

26. Given the already existing breach, and the rapidly approaching ability to calculate whether there are damages arising from that breach, Cathay contends, that it holds a right of recoupment and/or setoff with regard to the Disputed Fees in its possession. Under normal circumstances, it would hold a colorable right as to LBM to retain the Disputed Fees to assure satisfaction of LBM's payment obligation to, and to also refuse to pay any future Fees to LBM.

27. Were the Court to approve the Stipulation in its present form, Cathay's setoff rights will be abrogated by the Trustee's competing claim to the Disputed Fees. The Trustee will be entitled to receive funds that Cathay would otherwise have been permitted to apply in re-payment of Paid Fees and in reduction of the Senior Loan balance. Moreover, the payment structure of the Stipulation will also reduce the portion of the net proceeds received from the estate by Cathay with each closing from 100% to 80%, and necessarily impede Cathay's collection efforts as to LBM.

28. Cathay submits that the settlement reached by LBM and the Trustee should not be approved in a form that places LBM in breach of its agreement with Cathay. Cathay could not be heard to complain if all that LBM were doing were assigning to the estate all or a portion of LBM's rights, whatever they may be. To the extent that LBM decides to do more than that, and as a result breaches its contract with Cathay, Cathay respectfully requests that any order entering approving that settlement expressly contain language indicating that the entry of the order is

without prejudice to the respective right and remedies of Cathay and LBM as between each other.

29. Cathay, therefore, requests that any order that enters with regard to the Motion and in approval of the Stipulation contain express language in a form substantially similar to the following or as otherwise approved by Cathay: "Notwithstanding approval of the Stipulation and Cathay's release of any portion of the Disputed Fees to the Trustee in accordance with the Stipulation, nothing herein shall be deemed to constitute a waiver or other relinquishment of rights granted to Cathay as to LBM under the Subordination Agreement and/or Disbursement Agreement, or shall be deemed to alter any party's rights as to each other under those agreements. In addition, nothing herein shall be deemed to constitute a determination that Cathay is obligated to continue to pay the Fees to LBM under the Subordination Agreement."

WHEREFORE, the Cathay respectfully requests this Court condition approval of the Motion on agreement by the Trustee to include the language requested by Cathay in Paragraph 29 above in the order granting the Motion, and for such further and additional relief as is appropriate.

Respectfully submitted,

CATHAY BANK

By its attorneys,

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Dated: May 4, 2009

CERTIFICATE OF SERVICE

I, John J. Monaghan, Esq., counsel to Cathay Bank in connection with the above-captioned case, hereby certify that on this 4th day of May, 2009, I served a copy of the foregoing pleading by first-class mail, postage prepaid, upon those parties not otherwise served via ECF.

/s/ John J. Monaghan

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Ch. 11 Case No. 06-13020

Boston Police
Detail Billing Unit
P.O. Box 191776
Boston, MA 02119

Allstate Painting Co., Inc.
34 Day Street
Norwood, MA 02062

Buonasaro Construction
Peter Buonasaro
149 North Street, Ste 1
Boston, MA 02109

Boston Water & Sewer Commission
980 Harrison Avenue
Boston, MA 02119

Colony Hardware Supply
305 Freeport Street
Dorchester, MA 02122

Curragh Construction
94 St. Marks Road
Boston, MA 02124

Door Systems, Inc.
120 Alexander Street
P.O. Box 511
Framingham, MA 01704

Extreme Plumbing
Ernie Cito
256 Washington Street
Boxford, MA 01921

Leamar Industries
171 Locke Drive
Marlborough, MA 01752

Lynco Fire Protection Inc.
19 Grant Avenue
Burlington, MA 01803

MA Waste Systems, LLC
300 Centre Street
Holbrook, MA 02343

Marr Scaffolding
One D Street
Boston, MA 02127

National Lumber
Rocky Carlino
71 Maple Street
P.O. Box 9032
Mansfield, MA 02048

R & R Sales, Inc.
174 Hampton Street
Boston, MA 02119

Richie's Insulation, Inc.
111 Old Bedford Road
Westport, MA 02790

Sani-kan Portable Sanitation
P.O. Box 16400
Rumford, RI 02916

Tristate Stone, Inc.
120 Southbridge Road
P.O. Box 762
North Oxford, MA 01537

Tudor Plastering
Fintan Murtagh
50 Bellevue Road
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